

BEFORE THE DEPARTMENT
OF PUBLIC SERVICE REGULATION
OF THE STATE OF MONTANA

In the matter of the adoption of New) NOTICE OF ADOPTION
Rule I and the amendment of ARM) AND AMENDMENT
38.5.8301 pertaining to renewable)
energy standards for public utilities)
and electricity suppliers)

TO: All Concerned Persons

1. On November 8, 2007, the Department of Public Service Regulation published MAR Notice No. 38-2-200 regarding notice of public hearing on the adoption and amendment of the above-stated rules at page 1798 of the 2007 Montana Administrative Register, issue number 21.

2. A public hearing was held on November 29, 2007. One person testified at the hearing. Four written comments were received by the December 6, 2007 deadline.

3. The department has thoroughly considered the comments and testimony received. A summary of the comments received and the department's responses are as follows:

COMMENT #1: Chuck Magraw, representing Renewable Northwest Project and Natural Resources Defense Council, commented that the rules are clear and well written.

RESPONSE: The department thanks Mr. Magraw for his comment.

COMMENT #2: Chuck Magraw commented that applying the renewable energy standard to all retail sales made by competitive electricity suppliers is reasonable and proper. He stated that this is not an interpretation of the statute but its plain meaning. Mr. Magraw commented that the legislature had ample opportunity to state that the renewable energy standard applied only to retail sales to small customers, but it did not do so.

COMMENT #3: The Large Customer Group (LGC) filed comments stating that it believes the requirement to apply the renewable energy standard to all retail sales of a competitive electricity supplier is a misreading of the legislation and of legislative intent. The LGC request the department adopt a rule applying the renewable energy standard only to that portion of a competitive electricity supplier's retail sales made to small customers. The LGC asserts that by changing the definition of competitive electricity supplier, the legislature intended to exclude sales to large customers from the renewable energy standard. The LGC states that it is

undisputed that the legislative history of HB 681 favors its interpretation of the statute.

COMMENT #4: PPL EnergyPlus, LLC (PPL) filed comments stating that the legislature intended to confine the scope of the renewable energy standards to retail sales to small customers. PPL quoted extensively from testimony offered to legislative committees and committee meetings to support its position.

COMMENT #5: The Montana Environmental Information Center (MEIC) filed comments stating it supported adoption of the rules as proposed and that it agreed with the hearing comments of Chuck Magraw. MEIC stated the HB 681 requires entities that sell power directly to end-use customers to comply with the renewable energy standard.

RESPONSE: The department is sympathetic to the concerns of the LGC and PPL. However, the department may neither add nor subtract from the statutory language. If statutory language is unambiguous, then legislative intent must be determined from the language. In such a situation, the department may not consider legislative history. No commenter suggests that the statutory language is ambiguous and the department concludes that it is not. The plain language of the statute requires each competitive electricity supplier to procure a percentage of its retail sales in Montana from eligible renewable resources. There are three types of retail electricity suppliers: those who sell to large customers, those who sell to small customers, and those who sell to both large and small customers. Those who sell to small customers and those who sell to both large and small customers are competitive electricity suppliers. Proposed Rule I conforms to the plain language of the statute. If the plain language of the statute does not effect the legislature's intent, it is the legislature, not the department, that must fix it.

COMMENT #6: Chuck Magraw commented that the term "competitive electricity supplier" is used for the first time in Rule I(4) and that he thought the term should be defined or that the statutory definition should be referenced.

RESPONSE: "Competitive electricity supplier" is defined in 69-3-2003(4), MCA. Rules may not unnecessarily repeat statutory language. 2-4-305(2), MCA. Rule 1 clearly indicates that it implements 69-3-2003, MCA. The department concludes that it would be unnecessarily redundant to define the term or to provide an additional reference to the statute.

COMMENT #7: Chuck Magraw commented that the last sentence of Rule I(4) could be improved with additional punctuation and insertion of "the" to modify release.

RESPONSE: The department acknowledges and appreciates Mr. Magraw's comment. The department concludes that the meaning of the sentence is clear and that no alteration is necessary.

COMMENT #8: Chuck Magraw noted the absence of any reference M-RETS in Rule I(7) and wondered if renewable energy credits tracked by M-RETS could be used by competitive electricity suppliers to meet the renewable energy standard.

RESPONSE: M-RETS tracks renewable energy credits created in a portion of the Eastern Interconnection, including Montana Dakota Utilities' service territory in Montana. WREGIS tracks renewable energy credits created in the Western Interconnection, including NorthWestern Energy's service territory in Montana. Competitive electricity suppliers are permitted to sell to retail customers only in NorthWestern Energy's service area. The department concludes that competitive electric suppliers' use of renewable energy credits should be restricted to those created in the same interconnection and tracked by WREGIS.

COMMENT # 9: Chuck Magraw noted that in Rule I(4) an electricity supplier is permitted to assign a unique number to retail customers to protect their identities and that in ARM 38.5.8301(9)(b) a public utility is required to assign a unique number to each retail customer. He wondered if this difference represented a disconnect.

RESPONSE: The retail customers referred to in each section are customers of electricity suppliers. An electricity supplier's release of identifying information will be governed by the agreement between the electricity supplier and the retail customer. The public utility is required to provide the information required by ARM 38.5.8301(9)(b) to allow the public service commission to confirm and check the information provided by electricity suppliers. The retail customers in question will not be electricity supply customers of the public utility. The public utility will not be a party to the contracts between electricity suppliers and the retail customers. The department concludes that electricity suppliers should have the options to protect or disclose the identities of their customers but that the public utility should be required to protect the identities of the electricity suppliers' retail customers.

COMMENT #10: James Stromberg of Hinson Power Co. commented that the draft rule is too broad. He stated that 69-3-2006(6) imposes a reporting requirement on public utilities and competitive electricity suppliers and that electricity suppliers that are not competitive electricity suppliers are not required by law to report to the PSC. Mr. Stromberg suggested that the proposed rule be revised to clearly specify that it is applicable only to competitive electricity suppliers.

RESPONSE: The department agrees that the renewable energy standard applies only to public utilities and competitive electricity suppliers. The department disagrees that 69-3-2006(6) imposes any reporting requirement. There is no 69-3-2006(6). 69-3-2006, MCA, grants the Public Service Commission authority to adopt rules to generally implement and enforce the provisions of Title 69, Chapter 3, Part 20. To enforce the statute, the department must be able to identify competitive electricity suppliers. The reporting requirements placed on all electricity suppliers by Rule I(3) are a reasonable and necessary means for the department to collect the data needed to enforce the statute.

COMMENT #12: PPL commented that the definition of retail customer in Rule I(d) is too restrictive. PPL stated that a commercial customer may have a single integrated operation located on non-contiguous properties and implied that such should be treated as an individual load.

RESPONSE: The department agrees that the proposed definition of retail customer may be too restrictive in some unusual situations. The department is not persuaded that reference to a single transmission agreement is the appropriate method to address those unusual situations. The department has amended the proposed definition of retail customer to provide a method for the customer or its electricity supplier to petition the public service commission for a determination that it qualifies as a single retail customer.

COMMENT #13: PPL commented that Rule I(3) lacked clarification as to the due date for the first period and suggested that an average monthly demand shortfall in 2007 would appear to subject an energy supplier to the renewable energy standard in 2008.

RESPONSE: As explained in Response to Comment #10, the purpose of reports required by Rule I(3) is to allow the department to identify competitive electricity suppliers and to implement and enforce the statute. Rule I(9) requires a competitive electricity supplier to submit a renewable energy procurement plan with the annual report required of all electricity suppliers by Rule I(3). An electricity supplier that is a competitive electricity supplier in 2007 is not required to comply with the renewable energy standard in 2008 unless it is a competitive electricity supplier in 2008. The department concludes that the recommended amendment is not necessary.

4. The department as adopted New Rule I, ARM 38.5.8302 with the following changes, stricken matter interlined, new matter underlined:

NEW RULE I (38.5.8302) RENEWABLE ENERGY STANDARD –
ELECTRICITY SUPPLIERS (1) through (2)(c) remain as proposed.

(d) “retail customer” means

(i) any customer that purchases electricity supply for residential, commercial, or industrial end-use purposes, does not resell electricity to others, and is separately identified in a public utility’s billing system as a person or entity to which bill are sent for service to:

(iA) metered and/or unmetered facilities located on contiguous property;

(iB) public street and/or highway lights; and

(iC) any combination of (2)(d)(i)(A) and (d)(ii)(B); or

(ii) any customer determined by the public service commission to be a retail customer on petition for such determination by either the electricity supplier or the customer.

(3) through (9) remain as proposed.

5. The department has amended ARM 38.5.8301 exactly as proposed.

/s/ Greg Jergeson
Greg Jergeson, Chairman
Public Service Commission

/s/ Robin A. McHugh
Reviewed by Robin A. McHugh

Certified to the Secretary of State, December 10, 2007.